1. **Li (Migration) [2017] AATA 461 (17 March 2017)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Ming Li
CASE NUMBER:	1602128
DIBP REFERENCE(S):	BCC2015/1834902
MEMBER:	Carolyn Wilson
DATE:	17 March 2017
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicant an Employer Nomination (Permanent) visa.

Statement made on 17 March 2017 at 1:49pm

CATCHWORDS
Migration – Employer Nomination (Permanent) (Class EN) Visa – Subclass 186 – cl 186.213(1) – Applicant provided bogus IELTS test report – False and misleading statements – Girlfriend an Australian permanent resident – No statements from girlfriend or family – No compelling circumstances for waiver

LEGISLATION
5. *Migration Act 1958*, ss 5, 65
Migration Regulation 1994, Schedule 2 cl 186.223(1), Schedule 4

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 February 2016 to refuse to grant the applicant an Employer Nomination (Permanent) visa under s.65 of the *Migration Act 1958* (the Act).

7. The applicant applied for the visa on 26 June 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.186.213(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he had provided a bogus IELTS test report form with his application and there were not reasons to waive the requirements of cl.4020(1).

8. The applicant appeared before the Tribunal on 23 February 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

9. The applicant was represented in relation to the review by his registered migration agent.

10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213(1) for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

12. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

13. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

14. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

16. The applicant provided an IELTS test report form with his application. A comparison of the photograph on the IELTS form was made with photographs of the applicant in his passport and in a photo taken for his medical assessment. It appeared the person who undertook the IELTS test was not the applicant. The applicant does not dispute this. He told the Tribunal he paid a company in China to help him with the IELTS test. When he could not obtain the requisite scores himself, they provided a bogus result form to him. The applicant has expressed remorse, and the Tribunal notes the applicant was co-operative and honest at the hearing when explaining how he had obtained the bogus document.

17. The Tribunal finds the IELTS test report form is a bogus document that the applicant provided with his visa application. The Tribunal finds the IELTS test report purports to have been, but was not, issued in respect of the applicant. Further, the report was obtained because of false and misleading statements through an imposter sitting the test in the applicant's place.

18. Therefore, as the applicant has provided a bogus document, he does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) BE WAIVED?

19. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

21. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

22. The applicant has not identified any compelling circumstances that affect the interests of Australia, and on the material before it, the Tribunal could not be satisfied that there are any such circumstances that justify the grant of the visa.

23. At the hearing the applicant said the interests of his girlfriend, an Australian permanent resident, would be adversely affected if he was not granted the visa. This was the first time this claim had been raised, and there was no documentary evidence, such as statutory declarations or evidence of her permanent residence status, to support the claim. The Tribunal put to the applicant his girlfriend had not even attended the hearing to support him, and could not be satisfied he was in a relationship or that there were compelling or compassionate circumstances affecting her interests. The applicant said he would provide statutory declarations from his girlfriend and her parents showing he was in a relationship with her and how she would be affected. The Tribunal granted him time to do this.

24. The applicant provided the following documents post hearing: a letter from his sponsoring employer; a letter from the applicant's sister Ms Hao Li; a letter from the applicant; and photographs of the applicant and a female.

25. The applicant's sister states she is in Australia as the holder of a Student visa. She is distressed at the prospect of him having to leave Australia because she relies on her brother for practical and emotional support. However, as the applicant's sister is not a permanent resident or citizen of Australia or New Zealand, the Tribunal cannot give this circumstance any weight as a compassionate or compelling circumstance that affects the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

26. There were no statements or statutory declarations from the applicant's girlfriend or her parents. The applicant states in his letter that the parents would not write anything as they are not supportive of the relationship with him in the current circumstance where he will have to depart Australia for 3 years. There was no explanation as to why the girlfriend did not write a statement or provide any evidence herself.

27. The Tribunal has no evidence before it, apart from the applicant's assertion and some uncaptioned photographs, to demonstrate he is in a relationship with an Australian permanent resident. There is no evidence of how this person's interests would be affected. The Tribunal is not satisfied on the limited evidence before it that there are compelling or compassionate circumstances affecting the interests of the girlfriend, even if she is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

28. The applicant has not claimed there are compassionate or compelling circumstances affecting the interests of his employer that justify granting the visa. There is no assertion in the support letter from the employer that their interests would be affected. The letter merely expresses an intention to sponsor him. At the hearing the applicant also conceded that since his visa was refused he rarely worked for the sponsor, but has been studying English instead.

29. The Tribunal finds the requirements of cl.4020(1) should not be waived as there are no compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

30. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.186.213(1).

DECISION

31. The Tribunal affirms the decision not to grant the applicant an Employer Nomination (Permanent) visa.

Carolyn Wilson
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

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